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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2018-CP-10-00148
Appellate Case No. 2021-000784

Dewberry 334 Meeting Street, LLC,

Appellant,

v.

City of Charleston and
City of Charleston Board of Architectural Review-Large,

Respondents.

FINAL BRIEF OF RESPONDENTS

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INTRODUCTION

In the City of Charleston (the "City"), as in most other jurisdictions, the touchtone of architectural review is exterior architectural *appearance*. It's all about aesthetics.

In furtherance of this objective, a careful reading of the City's Zoning Ordinance (the "CZO") unequivocally establishes that the City Council of Charleston ("City Council") conferred broad authority on the City's Board of Architectural Review-Large ("BAR" or "Board") to consider applications altering the exterior architectural appearance of structures in the City's Old and Historic District. **See R. pp. 145-159.**[1]

[1] Pages 145 through 159 of the record include Part 6 of the CZO, setting forth regulations governing the City's historic districts. These provisions are codified as Sec. 54-230 through Sec. 54-248 of the CZO.

Sec. 54-230 of the CZO articulates the purpose behind establishing the City's historic districts—emphasizing the need to protect and preserve the existing appearance of such districts. **R. p. 145.** Sec. 54-232.a grants broad authority to the BAR to review applications for alterations to the exterior architectural appearance of structures in the Old and Historic District. **R. p. 147.**

Sec. 54-240.b sets forth the elements to be considered by the BAR in reviewing such applications. **R. p. 154.** Sec. 54-240.d and Sec. 54-240.f articulate the grounds under which the BAR may determine a design is inappropriate and refuse a permit. **R. p. 155.** In short, the BAR must consider whether an alteration to the exterior architectural appearance of a structure within the Old and Historic District negatively impacts the "dignity and character" of the structure itself and whether such alteration "would be detrimental to the interests of the Old and Historic District and against the historic character and public interest of the city." **R. p. 155.**

Requiring the BAR to make this determination is not controversial. Most major treatises on zoning will include a chapter or section on historic preservation ordinances confirming this point. See, e.g., 2 Zoning and Land Use Controls § 7.03. Likewise, asking the BAR to determine whether an alteration to the exterior architectural appearance of a structure in an historic district will have a detrimental impact on the historic character of the district is no more subjective or vague than requiring a board of zoning appeals to find that "the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance." S.C. Code Ann. § 6-29-800(A)(2)(d).

Appellant Dewberry 334 Meeting Street, LLC ("Dewberry") attempts to refocus this appeal into a commentary on separation of powers, or the process for state agencies in adopting regulations, or constitutional vagueness. This case is not about the BAR making its own rules, as Dewberry suggests. The circuit court understood this argument and rejected it. As the circuit court recognized,

and as the record will bear out, the testimony relied upon by Dewberry as illegally adopting a rule of law "is more appropriately characterized as evidence tending to show and establishing that the BAR consistently applied the standards articulated in the ordinances adopted by City Council." **R. p. 11.**

This appeal is about the interpretation and construction of ordinances adopted by City Council. It is also about the BAR's application of those ordinances to the situation in this case. Here, the BAR carefully considered fifteen (15) after-the-fact requests by Dewberry and approved nine (9) of them. **R. p. 69, lines 13-18.** The denied requests arose from the installation of light fixtures and appurtenant lighting elements that adversely impacted the historic district by overemphasizing the scale of the subject building. **R. p. 67, lines 9-25; p. 70, lines 1-23.** As one board member noted, citing his own personal knowledge, the new lighting caused him to mistake the hotel for the USS Yorktown. **R. p. 61, line 20-p. 62, line 7.**

STATEMENT OF THE CASE

Dewberry owns and operates a hotel at 334 Meeting Street in the City's Old and Historic District. **R. p. 44, lines 3-12.** On October 16, 2017, Dewberry applied to the BAR for after-the-fact approval of Dewberry's installation of several exterior elements that had <u>not</u> been shown on the original architectural drawings previously approved by the BAR, including light fixtures and appurtenant lighting elements. **R. p. 46, lines 23-25; p. 74.**

On December 13, 2017, the BAR held a hearing on Dewberry's request. **R. p. 42.** During the hearing, Lockie Brown, the vice-president of design for Dewberry, conceded that the lighting design should have been approved prior to installation:

> The—the lighting design was not part of the original drawings, not a part of the BAR approval. No excuses from Dewberry Capital. <u>It should have been—should have been a part of a submittal</u>. It was a long process in design from 2006 and working through the time. It was eight months behind and really were focusing on trying to get

> the building constructed in time for a May event that was happening in 2016.

R. p. 44, lines 22-23; p. 46, line 23-p. 47, line 6 (emphasis added)**.**

The BAR voted unanimously to approve nine (9) of Dewberry's fifteen (15) after-the-fact requests, but denied much of the external lighting elements based on the adverse impacts to the exterior architectural appearance of the hotel and the historic character of the district. **R. p. 69, lines 8-18; p. 71, line 3-p. 72, line 14; p. 141.** As one board member explained:

> This building, being the scale that it is, does create a unique condition; and the uniqueness of that condition is that when you—when you dramatically light a building of this scale, as was noted during public comment, it does reinforce the size.
> And we've just spent a lot of time trying to make sure that new buildings in the historic district are in conformance with the scale and this sort of fabric and this—this lighting scheme is entirely—(Inaudible.)
> I think that—that this sort of dramatic lighting scheme, uplights and downlights, and certain—(Inaudible.) And things like that does place a detrimental effect on the character of the historic district.
> And I agree with [staff's] recommendations—(Inaudible.)

R. p. 67, lines 9-25. Other board members echoed this statement. **R. pp. 68, line 20-p. 69, line 4; p. 70, lines 17-23.** As a result, the BAR adopted the recommendation of the City Architect, denying the request as to the following specific lighting elements, shown in site plans and photographs throughout the record:

a) 34 in-ground "uplights" at every column around the building **R. p. 94;**
b) 13 lights on the west canopy **R. p. 99;**
c) 13 lights at the east elevation **R. p. 99;**
d) 44 exterior downlights at the 8th floor **R. p. 102;**
e) 30 parapet lights at the roof **R. p. 102;** and
f) Uplighting of 9 sconce lights at the ballroom **R. p. 110.**

The BAR required the external lighting fixtures to be removed. **R. p. 71, line 15-p. 72, line 14.**

In accordance with section 6-29-900(B)(2) of the South Carolina Code, on January 12, 2018, Dewberry filed a notice of appeal and request for pre-litigation mediation. **R. pp. 36-37.** The parties mediated the case, and the mediator declared an impasse. **R. pp. 38-40.**

On November 20, 2020, pursuant to section 6-29-915(F)(1) of the South Carolina Code and a series of consent orders, Dewberry filed a Petition and Grounds for Appeal. **R. pp. 24-35; pp. 190-207.** Dewberry contended that (1) the BAR had no jurisdiction over exterior illumination of buildings; (2) the BAR's application of the ordinances was unconstitutionally vague or indefinite; and (3) the BAR impermissibly adopted an internal standard. **R. p. 192.** Pursuant to Section (c)(4) of the Chief Justice's Order filed on April 3, 2020, as amended by Order filed on December 16, 2020, the circuit court decided against holding a hearing in the matter. **R. p. 6.**

On February 25, 2021, the circuit court entered an order denying and dismissing Dewberry's appeal, concluding: (1) the CZO confers broad jurisdiction on the BAR to consider applications for alterations to the exterior architectural appearance of a structure within the Old and Historic District; (2) the CZO provides sufficient guidance to the BAR on the criteria for evaluating such alterations; and (3) record evidence supports the BAR's finding that the new external light fixtures and appurtenant lighting elements overemphasized the size of the building to the detriment of the historic district. **R. pp. 6-23.** Dewberry received written notice of entry of the circuit court's order on February 25, 2021. **R. p. 36.**

On March 8, 2021, Dewberry served and filed a motion to reconsider, alter, or amend the circuit court's decision. **R. pp. 271-284.** On June 21, 2021, the circuit court denied Dewberry's motion. **R. pp. 1-5.** Dewberry received written notice of entry of the circuit court's order denying reconsideration on June 21, 2021. **R. p. 36.** On July 20, 2021, Dewberry filed and served its notice of appeal of the circuit court's orders. **R. p. 36.**

STANDARD OF REVIEW

"The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence." S.C. Code Ann. § 6-29-930(A). "In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law." Id.

An appellate court "gives great deference to the decisions of those charged with interpreting and applying local zoning ordinances." Gurganious v. City of Beaufort, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). "The appellate court is not free to substitute its judgment for that of the BOAR." Id. "Accordingly, [the appellate court] will not reverse the circuit court's affirmance of the BOAR unless the BOAR's findings of fact have no evidentiary support or the BOAR commits an error of law." Id.

ARGUMENT

I. The circuit court properly concluded that the CZO conferred authority on the BAR to approve or disapprove an alteration to the exterior architectural appearance of a structure within the Old and Historic District.

City Council conferred broad jurisdiction upon the BAR to review alterations to the "exterior architectural appearance" of a structure within the Old and Historic District. Dewberry incorrectly argues that the BAR's jurisdiction is limited to "physical" alterations and encourages this Court to read an exception into the CZO for "exterior illumination."

Respondents first note that the alteration here was physical. Dewberry installed light fixtures with appurtenant lighting elements that illuminated the building. **R. p. 63, line 10-p. 64, line 9.** As important, there is no mention of a requirement that alterations be "physical," and there is no exception for "exterior illumination." As the circuit court recognized:

> Several specific provisions of the CZO compel the Court to conclude that City Council took full advantage of the enabling legislation by

> extending the BAR's approval authority to apply to all alterations to the exterior architectural appearance of structures within the Old and Historic District—subject to exceptions not applicable here, such as areas not visible from the public right-of-way.

R. p. 13.

"Generally, historic district ordinances designate a portion of the jurisdiction as an 'historic area' and establish a committee to review any proposed changes in the exterior architectural appearance of structures within that area." 2 Zoning and Land Use Controls § 7.03[1] (2021). The General Assembly of South Carolina enacted enabling legislation which utilizes the same approach. See S.C. Code Ann. 6-29-870(A) (authorizing local government to appoint board of architectural review after enacting a zoning ordinance which regulates, among other things, "the right . . . to alter the exterior appearance of all buildings or structures within [designated historic] areas").

In accordance with the general rule and state enabling legislation, City Council articulated the purpose behind creating the Old and Historic District in Sec. 54-230 of the CZO, as follows:

> In order to promote the economic and general welfare of the city and of the public generally, and to insure the harmonious, orderly and efficient growth and development of the city, it is deemed essential by the city council of the city that the qualities relating to the history of the city and a harmonious outward appearance of structures which preserve property values and attract tourist and residents alike be preserved; some of these qualities being the continued existence and preservation of historic areas and structures; continued construction of structures in the historic styles and a general harmony as to style, form, color, proportion, texture and material between structures of historic design and those of more modern design. These purposes are advanced through the preservation and protection of old historic or architecturally worthy structures and quaint neighborhoods which impart a distinct aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation.

R. p. 145 (emphasis added).

The remaining ordinances delineating the BAR's authority and the standards governing the BAR's review of applications should be read in light of this expressly stated purpose. "The primary consideration in legislative construction is to ascertain the intent of the legislative body enacting the legislation." Fairfield Ocean Ridge, Inc. v. Edisto Beach, 294 S.C. 475, 481, 366 S.E.2d 15, 19 (Ct. App. 1988). "When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." Id. "In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent." Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). "Every technical rule as to construction of a statute is subservient to and must yield to the expression of the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the courts in their endeavor to ascertain that intent." Id. at 391-92, 154 S.E.2d at 676.

Construing City Council's ordinances conferring authority on the BAR in light of City Council's express purpose, it is easy to see that the BAR exercises broad jurisdiction to review applications for alterations to the exterior architectural appearance of a structure within the Old and Historic District:

> No structure which is within the Old and Historic District shall be erected, demolished or removed in whole or in part, nor shall the exterior architectural appearance of any structure which is visible from a public right-of-way be altered until after an application for a permit has been submitted to and approved by the Board of Architectural Review.

CZO § 54-232.a; **R. p. 147** (emphasis added). Dewberry all but concedes that this provision gives the BAR authority to review applications for lighting elements if such lighting elements alter the exterior architectural appearance of a structure:

> Those ordinances unquestionably give the BAR broad authority over changes to the exterior of buildings. They do not, however, expressly or impliedly give the BAR authority over lighting of structures at night that does nothing to alter the exterior architectural appearance of the structure.

App.'s Br. p. 11 (emphasis added).[2]

Nevertheless, Dewberry asserts, over and over, that the circuit court and Respondents cannot point to any wording in the CZO that expressly refers to the BAR's authority over exterior illumination of structures. **App.'s Br. p. 15.** To be clear, Sec. 54-232.a contains wording that expressly refers to the BAR's jurisdiction over exterior illumination of structures by directing the BAR to review applications for alterations to the exterior architectural appearance of a structure in the Old and Historic District. Dewberry simply wants to "read out" the application of this authority to the external illumination of structures. See Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.").

When Sec. 54-232.a is read in light of the remaining provisions of the CZO, Dewberry's argument for a contrary interpretation falls even shorter. See Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) ("It is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). Sec. 54-232.e of the CZO provides: "Evidence of the approval required [in Sec. 54-232.a] shall be a Certificate of Appropriateness issued by the [BAR] as created herein." **R. p. 148.** "Such certificate shall be a statement signed by the chairman of the [BAR] or

[2] For the reasons stated in Section IV, *supra*, the BAR found that the external light fixtures and appurtenant lighting elements installed by Dewberry alter the exterior architectural appearance of the building, and this finding is supported by the record evidence.

administrative officer, as applicable, stating that the new construction demolition, relocation or changes in the exterior architectural appearance for which application has been made are approved by the [BAR] . . . ." **R. p. 148;** CZO § 54-232.e (emphasis added).

Sec. 54-231.b of the CZO defines "exterior architectural appearance" to include "architectural character, general composition and general arrangement of the exterior of a structure, its height, scale and mass in relation to its immediate surroundings, the kind, color and texture of the building material and type and character of all windows, doors, light fixtures, signs and appurtenant elements that are visible from a street or public right-of-way." **R. pp. 145-146.** The inclusion of "height, scale and mass" in this definition emphasizes the importance of visibility and context—in contradistinction to Dewberry's theory that "exterior architectural appearance" solely relates to "physical" characteristics. See, e.g., CZO § 54-231.f ("Scale" means "building elements and details and the relationship of the building to itself, to humans, and to structures in its immediate surroundings, in terms of its visual unity, continuity and proportions."); **R. p. 146.**

Dewberry contends that the BAR may evaluate only an alteration to the light fixtures, not the use of such fixtures for external illumination. This contention ignores that the exterior architectural appearance of the existing "structure" refers to both the appearance of the building as a whole *and* each of the elements thereof. See CZO § 54-231.c (defining structure to include "in addition to buildings, walls, fences, signs, light fixtures, steps or appurtenant elements thereof."); **R. p. 146.** It seems beyond dispute that an alteration to the external illumination of a building as a whole constitutes an alteration to the exterior architectural appearance of such building, but, even if it is not, there is sufficient evidence in this case that the new external lighting alters the appearance of the hotel building. See Section IV, *supra*.

City Council also adopted standards for the BAR to apply in reviewing applications to alter the exterior architectural appearance of a structure, which emphasize the importance of aesthetics: "In reviewing an application to demolish, or demolish in part, or remove, *or alter the* exterior architectural *appearance of* any existing structure, the Board of Architectural Review shall consider, among other things, the historic, architectural *and aesthetic features* of such structure, the nature and character of the surrounding area, the historic or culturally important use of such structure and the importance to the city." CZO § 54-240.b (emphasis added); **R. p. 154.** Sec. 54-240.d provides:

> Among other grounds for considering a design inappropriate and requiring denial or deferral and resubmission are the following effects: Arresting and spectacular *effects*, violent contrasts of materials *or colors* and intense or lurid colors, a multiplicity or incongruity of details *resulting in a restless and disturbing appearance*, *the absence of* unity, *visual compatibility* and coherence in composition, form and proportion not in consonance with the dignity and character of the present structure (in the case of repair, remodeling or enlargement of an existing structure) or with the prevailing character of the immediate surroundings (in the case of a new structure).

R. p. 155 (Emphasis added).

Fundamentally, Dewberry asks the Court to read the applicable ordinances as governing only alterations to a structure, arguing that external illumination does not involve the alteration of a structure. Respondents disagree because Sec. 54-232.b expressly requires the BAR to review alterations *to the exterior architectural appearance of* the structure, not just alterations to the structure itself. City Council's direction to the BAR should not be second-guessed or diluted. Respondents respectfully request that the South Carolina Court of Appeals AFFIRM the circuit court in this respect.

II. The circuit court correctly characterized the City Architect's testimony regarding uplighting and downlighting as evidence that the BAR has consistently applied the ordinances adopted by City Council.

This appeal does not implicate a separation of powers issue, nor does it involve the proper procedure for a state agency to adopt a regulation, as Dewberry suggests.

Dewberry raised a separation of powers issue in the "FACTS" section of its brief. **App.'s Br. p. 2.** This issue appears related to whether the BAR could adopt what Dewberry characterizes as an informal rule applicable to uplighting and downlighting in the Old and Historic District. Dewberry also raises an issue regarding the BAR's authority to adopt such an informal rule in Section I of its Argument involving the BAR's authority to review applications for alterations to the exterior architectural appearance of structures in the Old and Historic District. **App.'s Br. p. 10.**

Both arguments arise from the testimony of Dennis Dowd, the City Architect, during the hearing before the BAR, as follows:

> . . . . [O]ver the years, the board has consistently denied up and down lighting of buildings viewing it as detrimental to the character of historic structures and the city as a whole and to neighborhoods.
>
> And each request has been reviewed on a case-by-case basis. Generally, the only building allowed to have up or down lighting have been civic buildings. Imagine if every building in the city of this type were lit up this way, it would have a dramatic effect of the historic character of the city, in my opinion.

R. p. 61, line 17-p. 62, line 9 (emphasis added). A board member also stated that the board had what he described as a "long track record of—of discouraging dramatic uplighting and down lighting of architectural features . . . ." **R. p. 67, lines 5-8** (emphasis added)**.** But the board member continued:

> This building, being the scale that it is, does create a unique condition; and the uniqueness of that condition is that when you—when you dramatically light a building of this scale, as was noted during public comment, it does reinforce the size.

R. p. 67, lines 9-14 (emphasis added).

The circuit court rejected Dewberry's attempt to re-characterize this testimony as the exercise of rule-making authority:

> Dewberry characterizes this testimony as suggesting the adoption of an 'internal' standard. The Court finds that the Dewberry's characterization is without merit. Dowd's testimony is more appropriately characterized as evidence tending to show and establishing that the BAR consistently applied the standards articulated in the ordinances adopted by City Council.

R. p. 11. It is clear from the underlined portions of the testimony that Dowd and the board member simply reviewed the uplighting and downlighting at the hotel consistently with previous applications, concluding that the quantity of such lighting created a dramatic effect which was detrimental to the character of the historic district.[3]

The separation of powers cases cited by Dewberry articulate important policies, but involve completely different factual situations from the present case. See Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 456, 790 S.E.2d 763, 773 (2016) (Justice Kittredge, concurring, articulates the importance behind the separation of powers doctrine in the face of rulemaking by administrative agencies, concluding that a 2011 position statement issued by the South Carolina Board of Physical Therapy did not have the "rule of law" because it was not

[3] Dewberry also asserts that the hotel building, which formerly served as a federal office building, should be treated as a civic building and exempted from the supposed "rule" articulated by Dowd. The only example of a "civic" building with uplighting and downlighting cited in the record is St. Matthews Lutheran Church. **R. p. 56, lines 5-10.** The BAR modified the lighting at St. Mathews "[e]xtensively . . . to reduce its impact." **R. p. 66, line 22-p. 67, line 4.** The BAR could not have undertaken the same review in this case because Dewberry requested after-the-fact approval. In any event, while private ownership does not convert a civic use into something else, conversion of the building from an office space to a hotel certainly does! Cf. Charleston Cty. Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 69, 459 S.E.2d 841, 844 (1995) ("[T]he question of whether a park is a municipal use does not depend upon which entity owns the property.").

adopted in accordance with the Administrative Procedures Act);[4] Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 281, 802 S.E.2d 794, 802 (2017) (articulating the importance of separation of powers in balancing "a person's constitutional and statutory right to challenge an administrative agency's decision with the deference that should be given to an agency tasked by the legislature with administering a particular statutory scheme."); Hamdi v. Rumsfeld, 294 F.3d 598, 607 (4th Cir. 2002) (rejecting "next friend" standing for attorney to file writ of habeas corpus due to jurisdictional limitations on courts vis-à-vis other branches of government).

The other regulatory cases cited by Dewberry actually support the BAR's position because they derive from Beard-Laney, Inc. v. Darby, 213 S.C. 380, 389, 49 S.E.2d 564, 567 (1948), which provides, in pertinent part:

> Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the *field* which the regulations may cover. They may imply or express restricting limitations of public policy. And of course they may contain express prohibitions. But in the absence of such limiting factors it is not to be doubted that such a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it. To say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions.

(Emphasis added). In the present case, City Council expressly conferred jurisdiction over the BAR to review applications for alterations to the exterior architectural appearance of structures in the Old and Historic District, including the installation of light fixtures and appurtenant lighting elements. Sec. 54-232.b; **R. p. 147.** However, even ignoring the plain language of Sec. 54-232.a,

[4] It is axiomatic that City Council does not have to comply with the APA in adopting ordinances. Likewise, the APA does not apply to the BAR. See S.C. Code Ann. § 1-23-10(1) (defining "agency" as including state boards and commissions).

common sense dictates that City Council intended for the BAR to review changes to external illumination of structures where, as here, such illumination would render the BAR's review and approval of other aspects, including materials and colors, meaningless.

Dewberry also suggests that the BAR's use of Dowd's testimony violates the uniformity requirement in section 6-29-720(B) of the South Carolina Code by applying different rules to different buildings within the same district. Section 6-29-720(B) states: "Except as provided in this chapter, all of these regulations must be uniform for each class or kind of building, structure, or use throughout each district, but the regulations in one district may differ from those in other districts." The plain language of section 6-29-720(B) permits different regulations to be applied to different uses within a district, and a civic use is different from an accommodations (or hotel) use.

In the present case, the BAR did not adopt or purport to apply a "rule of law." Consequently, the South Carolina Court of Appeals should affirm the circuit court.

III. The circuit court properly determined that the CZO provides sufficient guidance to the BAR in evaluating alterations to the exterior architectural appearance of structures in the Old and Historic District.

Sec. 54-240.b, Sec. 54-240.d, and Sec. 54-240.f. of the CZO set forth the criteria that the BAR utilizes in evaluating applications for alterations to the external architectural appearance of structures in the Old and Historic District. **R. pp. 154-155.** In Sec. 54-240.b of the CZO, City Council directed the BAR as follows:

> In reviewing an application to demolish, or demolish in part, or remove, or alter the exterior architectural appearance of any existing structure, the Board of Architectural Review shall consider, among other things, the historic, architectural and aesthetic features of such structure, the nature and character of the surrounding area, the historic or culturally important use of such structure and the importance to the city.

R. p. 154. Pursuant to Sec. 54-240.d, City Council authorized the BAR to deny such an application, providing:

> Among other grounds for considering a design inappropriate and requiring denial or deferral and resubmission are the following effects: Arresting and spectacular effects, violent contrasts of materials or colors and intense or lurid colors, a multiplicity or incongruity of details resulting in a restless and disturbing appearance, the absence of unity, visual compatibility and coherence in composition, form and proportion not in consonance with the dignity and character of the present structure (in the case of repair, remodeling or enlargement of an existing structure) or with the prevailing character of the immediate surroundings (in the case of a new structure).

R. p. 155 (emphasis added). Sec. 54-240.f articulates one of the "other grounds" upon which the BAR may deny such an application:

> The [BAR] may refuse a permit or Certificate of Appropriateness for the erection, construction, alteration, demolition, partial demolition, or removal of any structure within the Old and Historic District, which in the opinion of the [BAR], would be detrimental to the interests of the Old and Historic District and against the historic character and public interest of the city.

R. p. 155 (emphasis added). Dewberry ignores these standards, instead pointing to the Secretary of the Interior's Standards for Historic Preservation and the 2017 BAR Principles for New Construction and Renovation and Repairs as the only standards applicable to a review under Sec. 54-232.a. **R. p. 151.**

Dewberry also incorrectly asserts that the ordinances governing the BAR's review lack sufficient specificity to authorize the BAR to deny Dewberry's request for after-the-fact approval of the new external light fixtures and appurtenant lighting elements added to the building during construction.

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). "The exercise of police

power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose." Id. "The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent on [appellant] to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." Id.

Sec. 54-240.b, Sec. 54-240.d, and Sec. 54-240.f are the primary provisions governing the BAR's review of Dewberry's application. In Burke v. City of Charleston, 893 F. Supp. 589, 612 (D.S.C. 1995), the federal district court reviewed and upheld substantially the same standards against a vagueness challenge. On appeal, the Fourth Circuit vacated the decision only because plaintiff lacked standing. See Burke v. City of Charleston, 139 F.3d 401 (4th Cir. 1998). The Fourth Circuit found it unnecessary to address the substantive claims. Id.

As reflected in the district court's extensive case law citations on the issue in Burke, Dewberry misunderstands the standard for "specificity," especially as applied to the field of architectural review. See, e.g., Maher v. New Orleans, 516 F.2d 1051, 1063 (5th Cir. 1975) ("It is true, as Maher observed, that no officially promulgated regulations pinpoint each decision by the Commission. Nonetheless, apart from the evident purpose of the legislation and the taut lines of review maintained by the legislature over the operation of the Commission, other fertile sources are readily available to promote a reasoned exercise of the professional and scholarly judgment of the Commission. It may be difficult to capture the atmosphere of a region through a set of regulations. However, it would seem that old city plans and historic documents, as well as photographs and contemporary writings may provide an abundant and accurate compilation of data to guide the Commission.").

In A-S-P Assocs. v. Raleigh, 258 S.E.2d 444, 453 (N.C. 1979), the City of Raleigh established a historic district, created a historic commission, and required a certificate of

appropriateness from the commission for any proposed activities within the historic district. Id. Both state law and Raleigh's ordinances required the historic commission to review such applications to prevent those activities "which would be incongruous with the historic aspects of the district." Id. This standard is not unlike the criteria articulated in the City's governing ordinances, which focus on the objective impact to the historic character of the district.

The Supreme Court of North Carolina rejected a challenge to this standard on the grounds of vagueness, explaining:

> The general policy and standard of "incongruity," adopted by both the General Assembly and the Raleigh City Council, in this instance is best denominated as "a contextual standard." A contextual standard is one which derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. *See* Turnbull, *Aesthetic Zoning*, 7 Wake Forest L. Rev. 230, 242 (1971). In this instance the standard of "incongruity" must derive its meaning, if any, from the total physical environment of the Historic District. That is to say, the conditions and characteristics of the Historic District's physical environment must be sufficiently distinctive and identifiable to provide reasonable guidance to the Historic District Commission in applying the "incongruity" standard.

Id. (emphasis added).

The Court also emphasized the practical difficulties in adopting minute details for each possible activity governed by a historic preservation ordinance, emphasizing that other jurisdictions had reached the same conclusion: "To achieve the ultimate purposes of historic district preservation, it is a practical necessity that a substantial degree of discretionary authority guided by policies and goals set by the legislature, be delegated to such an administrative body possessing the expertise to adapt the legislative policies and goals to varying, particular circumstances." Id. at 454. "It is a matter of practical impossibility for a legislative body to deal with the host of details inherent in the complex nature of historic district preservation." Id. "It is therefore sufficient that a general, yet meaningful,

contextual standard has been set forth to limit the discretion of the Historic District Commission." Id. "Strikingly similar standards for administration of historic district ordinances have long been approved by courts of other jurisdictions." Id.

The case law cited by Dewberry does not contradict the decision of the Supreme Court of North Carolina, but instead advances it. Schloss Poster Advert. Co. v. Rock Hill, 190 S.C. 92, 93, 2 S.E.2d 392, 393 (1939), is the only published opinion cited by Dewberry invalidating an ordinance for lack of specificity. The ordinance at issue in Schloss read as follows: "Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the City of Rock Hill without having first obtained from the city council a permit to do so."

The Schloss Court invalidated the ordinance because there were no standards governing City Council's decision. See id. at 96, 2 S.E.2d at 394 ("Thus the city is clothed with the uncontrolled power to capriciously grant the privilege to some and deny it to others; to refuse the application of one landowner or lessee and to grant that of another, when for all material purposes, the two are applying for precisely the same privileges under the same circumstances.").

The ordinances governing review by the BAR in the present appeal stand in stark contrast to the ordinance addressed in Schloss, which the Court emphasized could not be considered a "zoning ordinance." Id.; see also Petersen v. City of Clemson, 312 S.C. 162, 171-72, 439 S.E.2d 317, 323 (Ct. App. 1993) ("In Schloss, the ordinance in question was totally void of any standards or conditions, making arbitrary discrimination and abuses by the City possible. The court, in fact, declared the ordinance before it was in no sense a zoning ordinance because it did not prescribe regulations, but instead committed zoning decisions to the unrestrained will of the City authorities for any reason deemed satisfactory to them.").

Since Schloss, appellate courts in South Carolina have showed extreme restraint in striking down ordinances under a challenge of "vagueness," especially in the zoning context. For example, in Hodge v. Pollock, 223 S.C. 342, 347-48, 75 S.E.2d 752, 754 (1953), the Supreme Court of South Carolina addressed whether the "unnecessary hardship" test for a variance should be invalidated, explaining: "The office of the variance is to permit modification of an otherwise legitimate restriction in the exceptional case where, due to unusual conditions, it becomes more burdensome than was intended, and may be modified without impairment of the public purpose." The Court emphasized the lack of an all-inclusive definition of "unnecessary hardship," but still upheld the "wide discretion" conferred on the zoning board: "A board of adjustment is vested with a wide discretion in determining whether a variance should be granted in a particular case on the ground of unnecessary hardship." Id. "Its decision should be given great weight and the discretion vested in such board should not be interfered with unless arbitrary or clearly erroneous." Id.; see also City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 473 (1993) (refusing to invalidate an ordinance prohibiting "loud and unseemly" noise as unconstitutionally vague); Marathon Oil Co. v. Plymouth, 181 N.W.2d 668, 670 (Mich. 1970) (upholding planning commission's discretionary authority to grant permit if service station "is so arranged or maintained so as not to affect adversely the normal development or use of neighboring property in the same district or in an adjoining district").

In Peterson Outdoor Advert. v. City of Myrtle Beach, 327 S.C. 230, 234-35, 489 S.E.2d 630, 632 (1997), extensively cited by Dewberry, the Court again refused to invalidate a zoning ordinance on grounds of vagueness: "[A] municipality may delegate the administration of its ordinances to a board provided the board's discretion is sufficiently limited by clear rules and standards." In Peterson Outdoor, the Supreme Court of South Carolina expressly *upheld* the standards set forth in the subject ordinance, but required a remand to the local government to apply them: "[T]he City validly

exercised its authority in enacting the CAB Ordinance and in delegating the enforcement of this ordinance to the CAB." Id. at 235, 489 S.E.2d at 632. In Kroger Co. v. Plan Comm'n of Plainfield, 953 N.E.2d 536, 543 n.2 (Ind. Ct. App. 2011), another case Dewberry cites as "instructive," the appellate court concluded that the governing ordinance contained sufficient specificity, but remanded the matter because the planning commission's *findings* were insufficient.

Dewberry desires that City Council adopt other ordinances addressing external lighting, such as the one adopted by the Town of Mount Pleasant. This is a legislative decision, not a judicial one. The specificity of Mount Pleasant's ordinance has no legal impact on the constitutionality of the City's governing ordinances. As the circuit court explained: "So long as the CZO meets the constitutional requirements, nothing invalidates an ordinance simply because it could be more specific." **R. p. 19.**

Nor is Dewberry's emphasis on the City's standards governing the illumination of signs controlling: "The Court similarly rejects the [Appellant's] emphasis on the City's standard governing the illumination of signs." **R. p. 19.** The specificity of such regulations has no legal effect on the constitutionality of other provisions in the ordinance. This is especially true with respect to the regulation of signs, which inherently requires special attention due to its First Amendment implications. This is precisely why many historic district ordinances—like the City's—have separate standards governing signs. See Zoning and Land Use Controls § 7.03[3] (2021) ("Signs, of course, are typically on the outside of buildings and may significantly affect the appearance of a building, site or district. Thus, most local governments with preservation ordinances include the erection or installation of signs under the scope of the ordinances, including the review processes.").

As the circuit court correctly held, Dewberry failed to meet its burden of establishing by clear and convincing evidence that City Council's ordinances governing BAR review of the

underlying application are unconstitutionally vague. Respondents respectfully request that the South Carolina Court of Appeals AFFIRM the circuit court's ruling on this ground.

IV. The circuit court correctly affirmed the BAR's finding that the light fixtures and appurtenant lighting elements installed by Dewberry altered the exterior architectural appearance of the hotel building, to the detriment of the building and the historic district, because record evidence supports this finding.

As a preliminary matter, Dewberry did not challenge the BAR's finding that the exterior lighting elements overemphasized the size of the hotel building to the detriment of the historic district in its appeal to the circuit court or to this Court. **R. p. 67, lines 9-25; p. 68, lines 20-22; p. 70, lines 14-18;** see Newton v. Zoning Bd. of Appeals, 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011) ("[T]he sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires."); Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

On the merits, the circuit court recognized that the "BAR's factual findings that the new external lights placed on the building overemphasized the height and scale of the building and detracted from the character of the historic district are supported by the record." **R. p. 22.** The circuit court was spot-on.

Bill Weston, who lives adjacent to the hotel, characterized the lights as "very bright," also noting they accentuated the 8th floor/bar on the building. **R. p. 58, lines 1-10.** Another witness testified that the lighting accentuated a non-confirming height backing up into a residential area. **R. p. 56, lines 16-18.**

Dennis Dowd, the City Architect, testified that the BAR "has consistently denied up and down lighting of buildings viewing it as detrimental to the character of historic structures and the city as a

whole and to neighborhoods." **R. p. 61, line 14-p. 62, line 3; p. 66, lines 4-9.** Dowd continued: "And each request has been reviewed on a case-by-case basis." **R. p. 61, lines 22-23.** "Generally, the only buildings allowed to have up or down lighting have been civic buildings." **R. pp. 61, 64-66.** "Imagine if every building in the city of this type were lit up this way, it would have a dramatic effect of the historic character of the city, in my opinion." **R. p. 61, line 25-p.62, line 3.**

The BAR's findings also are supported by the special personal knowledge of the individual board members, as set forth in the record. See Niggel v. Columbia, 254 S.C. 19, 25-26, 173 S.E.2d 136, 139 (1970) ("As a general rule, before the special personal knowledge of the members of the Board may be used as a basis for its decision, such fact must be set forth in the record, together with a statement of the facts which are known to the board and not otherwise disclosed in the record."). One board member supported the BAR's finding that the external lighting overemphasized the size and scale of the building by explaining that he had previously mistaken the hotel for the U.S.S. Yorktown. **R. p. 68, line 20-p. 69, line 4.** Another board member personally observed the lighting at the hotel, both while driving past it and from the roof. **R. p. 70, lines 14-23.** Like Dowd, one board member observed that similar buildings in the area did not have such external lighting because the BAR historically did not approve of it. **R. p. 66, line 22-p. 67, line 8.**[5]

The BAR's factual findings that the new light fixtures and appurtenant lighting elements placed on the building overemphasized the height and scale of the building and detracted from the character of the historic district are supported by the record. The circuit court's decision denying and dismissing Dewberry's appeal should therefore be AFFIRMED.

[5] As in many jurisdictions, the City's BAR consists of members with specialized knowledge and expertise. The BAR includes two (2) registered architects, an attorney, a licensed professional involved in construction or engineering, and a lay person. CZO § 54-233.b; **R. pp. 148.** All members must have "demonstrated experience in historic design or preservation" and at least one of several fields relating to planning, preservation, and/or real property. CZO § 54-233.b; **R. pp. 148-149.**

CONCLUSION

The circuit court considered and correctly rejected Dewberry's arguments that the BAR lacked authority to consider and approve or disapprove Dewberry's application for after-the-fact approval of the light fixtures and appurtenant lighting elements that altered the exterior architectural appearance of the hotel building. Likewise, the circuit court appropriately denied Dewberry's assertions that the BAR illegally attempted to exercise rule-making authority in this case or that the ordinances governing the BAR's review were unconstitutionally vague.

As the circuit court recognized, the BAR decided this case by applying the standards that City Council adopted—in other words, the BAR considered whether the light fixtures and appurtenant lighting elements installed by Dewberry altered the exterior architectural appearance of the hotel building to the detriment of the structure itself or to the Old and Historic District. The BAR's conclusions that Dewberry's alterations overemphasized the scale of the building to the detriment of the Old and Historic District are supported by substantial evidence, including neighbor testimony, staff opinion, and the personal knowledge of individual board members disclosed on the record.

Based on the foregoing, the circuit court's decision should be AFFIRMED, and Dewberry's appeal should be DISMISSED.

<SIGNED ON THE FOLLOWING PAGE>

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2018-CP-10-00148
Appellate Case No. 2021-000784

Dewberry 334 Meeting Street, LLC,

Appellant,

v.

City of Charleston and
City of Charleston Board of Architectural Review-Large,

Respondents.

RESPONDENTS' CERTIFICATION FOR FINAL BRIEF

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I, the undersigned, Russell G. Hines, as counsel for Respondents, hereby certify that the **Final Brief of Respondents** complies with Rule 211(b), SCACR, and with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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